



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-89-27

### FACTS:

You are employed by a municipal sewer department in a city (City). You are a tenured permanent civil service employee.

You also operate a private business in the City. The function of this business is to install and repair sewer lines and sewer connections. You are required to obtain a City permit in order to enter the sewer and the City sewer inspector inspects your company's work upon completion

You have been injured while working in the employ of the City and, pursuant to c. 152, s.34, you have been collecting workman's compensation benefits in the amount of two thirds of your average weekly wage at the time of your injury. To date you have not returned to employment with the City. You have not applied for disability retirement pursuant to G.L. c. 32, nor has it been determined that you are totally and permanently disabled pursuant to G.L. c. 152 such that you are permanently unable to return to work. While you have been collecting workman's compensation, you have not been placed on lack of work status by the City. In general, if a municipal employee who is collecting workman's compensation submits a physician report certifying that he is able to perform his prior job duties, he will be able to return to work.

The City is self-insured for purposes of c. 152, and compensation payments are generally paid by the personnel department from City funds. The City also continues to pay its share of your health insurance benefits. You remain liable for the co-payment at the City rate provided to all City employees. You do not accrue sick time, vacation time and retirement benefits while you are on workman's compensation but you are credited with the benefits you had accrued prior your injury. Although an employee may use accrued sick leave pay to supplement his weekly compensation check, you have not done so.[1]

### QUESTIONS:

1. For purposes of G.L. c. 268A are you municipal employee during the time in which you collect workman's compensation benefits?
2. If you remain a municipal employee, may you receive compensation from private parties to install and repair sewer lines in the City in which you are employed?

**ANSWER:**

1. Yes.
2. No.

**DISCUSSION:****1. Municipal Employee Status**

G.L. c. 268A, s.1(g), defines a municipal employ "as a person performing services for or holding office, position, employment or membership in municipal agency, whether by election, appointment contract of hire or engagement, whether serving or without compensation, on a full, regular, part-time: intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) member of a charter commission established under Article LXXXIX of the Amendments to the Constitution" The issue of whether you retain your municipal employee status depends upon whether you continue hold employment in the City while receiving workman's compensation benefits.

In a determination of whether one continues to hold employment within a municipal agency, in Commission will examine the characteristics of in relationship between the employee and the agency, the Commission will consider whether a previously compensated employee continues to receive compensation from the municipal agency, whether in employee continues to receive the same retirement, insurance, collective bargaining, sick leave and other benefits available to municipal employees, whether in parties have a reasonable expectation that in employee will return to his municipal position and what actions have been taken by the parties terminate the employment relationship. No one factor is dispositive, as the Commission considers the cumulative effect produced by each factor, as well as analyzing each factual situation in light of the purpose of the conflict of interest law. See, EC-COI-84-46; 84-17; N.L.R.B. v. Economics Laboratory, Inc., 758 F.2d 931 (3rd Cir. 1988) (for purposes of union voting employment status continues until there is a manifestation of intent to terminate clearly communicated to other party); N.L.R.B. v. Newlyweds Foods, Inc., 753 F.2d 4 (1st Cir. 1985) (same).

For example, within the context of a leave of absence situation, the Commission has stated that state employee status does not continue during a leave of absence where the employee received no compensation, no fringe benefits and no retirement credit attributable to the state position during the leave of absence. EC-COI-84-17. However, a period of absence due to vacations, holidays, illness, or personal time does not terminate state employee status as the employee continues to receive state benefits such as retirement, insurance, collective bargaining and sick leave benefits attributable to the leave period. EC-COI-84- 46. The Commission finds that you remain a municipal employee while collecting workman's compensation benefits because you continue to receive compensation and employment benefits from the municipality and no action has been taken to terminate your employment relationship with the municipality.

#### a. Compensation

For purposes of G.L.c. 268A, compensation is defined as "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." The definition of compensation is broadly construed and is not limited to salary or wages. See, *Springfield v. Director of the Division of Employment Security*, 398 Mass. 786,790(1986). In *Springfield v. Director of the Division of Employment Security*, 398 Mass. 786 (1986), unemployment compensation benefits payable under G.L.c. 151A constituted compensation for purposes of G.L.c. 268A. The Commission concludes that receipt of workman's compensation benefits also constitutes compensation for purposes of c. 268A.

Workman's compensation benefits, similar to unemployment benefits, are economic benefits provided by the employer to compensate for lost wages. Locke, 29 Massachusetts Practice, 53 (1981). The underlying policy of the Workman's Compensation Act is to provide "adequate financial protection to the victims of industrial accidents. .. With workman's compensation the employee and the employee's family acquire a limited, although substantial right to be insured against the grievous financial impact that may result from injury in the workplace." *LaClair v Silberline Manufacturing Co., Inc.*, 379 Mass. 21,27(1979); see also, *Ahmed's Case*, 278 Mass. 180 (1932) (compensation is relief from inability to earn; employee beneficiary of contract between employer and insurer). Further, the obligation to pay workman's compensation benefits accrues within the employment relationship as a result of and in return for services rendered.[2] An employee may collect workman's compensation benefits only if he sustains a personal injury arising out of and in the course of his employment. See, *Madden's Case*, 222 Mass. 487,493(1916). Compare, *Springfield*, 393 Mass. at 790-791 (employer not obligated to pay employment security benefits except as result of employee having provided wage earning services).

Finally, in addition to receiving an economic benefit in the form of workman's compensation payments, you also continue to receive the same health insurance benefits from the City as you received before your injury. You do not earn additional vacation or sick time while receiving compensation benefits but you continue to hold the benefits which had accrued until your injury. See, *School Committee of Medford v. Medford Public School Custodians Association*, 21 Mass. App. Ct. 947, 948,949 (1986) (c. 152 contemplates payment for vacation earned but not taken at time of injury); *Rein v. Town of Marshfield*, 16 Mass. App. Ct. 519,523 (1983) (under c. 41, s.111F injured officer does not accumulate vacation or sick pay during period of injured on duty leave).

#### b. Reasonable Expectation to Return to Work

Retention of municipal status will also depend upon whether the parties have a reasonable expectation that the employee will return to his municipal position. Relevant factors include whether the employee has been replaced; whether the employee has retained seniority; and whether the employee's medical status will allow a return to

work. See, eg, *N.L.R.B. v. Economics Laboratory, Inc* 857 F. 2d 931,936 (3rd Cir., 1983); *N.L.R.B. v. Newlyweds Foods, Inc.*, 758 F. 2d 4,7(1st Cir., 1985); see generally, Annot. 85 ALR Fed 15. For example, when a municipal employee collecting workman's compensation has been declared to be totally and permanently disabled or been replaced or resigned or retired on a disability or other pension, his municipal employee status will cease. See, EC-COI-83-84 (Housing Authority member on temporary leave of absence continues to hold position as his position is not being filled by another).

The Commission finds that there remains a reasonable expectation that you will return to your position. You have not retired, resigned or applied for disability retirement. No determination has been made that you are totally and permanently disabled, nor has the City instituted civil service proceedings to remove you from your position pursuant to c. 31, s.41. If you receive the appropriate medical clearance you may return to your position. In conclusion, because your position has not been terminated and you receive economic benefits from the City you continue to hold your municipal position.

## 2. Private Business

As the Commission concludes that you are a municipal employee, you are subject to G.L. c. 268A. In particular, G.L. c. 268A, s.17 is pertinent to your private business. Section 17 generally prohibits a municipal employee from acting as agent for being paid by anyone other than the City, in relation to any decision application, contract or other particular matter[3] in which the City is a party or has a direct and substantial interest.

The construction, alteration, inspection and use of sewer connections are matters which the Legislature has delegated to the cities and towns for regulation. G.L. c. 83 et seq. The City permits that you must obtain prior to commencing sewer work and the inspection of your company's work upon completion are particular matters in which the City has a direct and substantial interest. The Commission has previously stated that a city or town has a direct and substantial interest in the application for and issuance of a permit as the issuance of a permit represents the local official's determination that the work complies with all relevant codes, laws, ordinances, rules and regulations and because work done pursuant to a permit is presumptively "in relation to" the permit. EC-COI-88-9 (town has direct and substantial interest in carpentry work which requires building permit); EC-COI-87-31 (town has direct and substantial interest in installation of septic system pursuant to permit).[4]

Therefore, the Commission concludes that, while you are a municipal employee, you may not receive compensation in your private business for work performed in the City, whether you perform the work or whether you subcontract the work. Also, you may not obtain permits on behalf of other contractors or private parties because you would be acting as the agent for these parties. See, *In the Matter of Robert P. Sullivan*, 1987 SEC 312,315.

DATE AUTHORIZED: August 29, 1989

[1] In rendering this opinion, the Commission has relied on the facts as stated by you and City officials. The advice provided in this opinion is intended to guide your prospective conduct and does not purport to review the propriety of your prior activities.

[2] The Commission notes that the employer ultimately pays for the benefits, either through insurance premiums or payments as a self-insurer, such as the City does.

[3] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[4] The Commission has suggested that the presumption that all work done pursuant to a permit is "in relation to" that permit may be overcome under certain circumstances. For example, if a municipal employee was one of many independent contractors on a major project and had no responsibility for any dealings with the town on any matters, he might not be considered to be privately compensated "in relation to" the permit. See, EC-COI-87-31. Under the circumstances you represent it is highly unlikely that you can overcome this presumption as the work your company performs is specific to the permit and is regulated and inspected by the department in which you are employed. EC-COI-88-4; 87-31.